

FILED
MISSOULA, MT
2006 NOV 16 PM 4 43
PATRICK E. DUFFY
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

GARY R. SCHLUND,)	CV 05-169-M-CSO
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Schlund brings this action under 42 U.S.C. §§ 401-433 and 42 U.S.C. §§ 1381-1383c seeking judicial review of an administrative law judge's ruling upholding the Commissioner on Social Security's decision denying Schlund's application for disability insurance benefits and supplemental security income benefits.

United States Magistrate Carolyn S. Ostby entered Findings and Recommendations in this matter on October 16, 2006. The Parties have indicated they do not object and so have waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1).

SCANNED

This Court will review the Findings and Recommendation for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000).

Judge Ostby found that the administrative law judge failed to properly evaluate the severity of Schlund's learning disorder because 1) the medical expert relied upon did not fully examine the records addressing Schlund's condition and 2) the judge did not appropriately consider the lay testimony in the case. Judge Ostby also concluded that the administrative law judge should reconsider the question of whether Schlund satisfied one of the psychiatric listings upon remand. The administrative law judge must also make an explicit credibility finding regarding Schlund's testimony as required under Ninth Circuit case law. Finally, Judge Ostby determined that the Appeals Council's review of Dr. Houser's report must be reevaluated upon remand. These issues shall be addressed upon remand.

I find no clear error with Judge Ostby's Findings and Recommendation (dkt #24) and adopt them in full.

Accordingly, IT IS HEREBY ORDERED that the Commissioner's motion for summary judgment (dkt # 14) is DENIED;

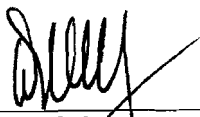
IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (dkt #12) is GRANTED; and

IT IS FURTHER ORDERED that the Commissioner's decision is

REVERSED and the case is REMANDED for further administrative proceedings consistent with this decision.

The Clerk of Court is instructed to enter judgment pursuant to sentence four of 42 U.S.C. § 405(g), reversing the Commissioner's decision and remanding this case for further administrative proceedings consistent with this Order and Judge Ostby's Findings and Recommendations.

DATED this 16th day of November, 2006.



Donald W. Molloy, Chief Judge
United States District Court